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CASE NO.

in the Supreme Court of the United States

July Term, 1982

CHARLES M. REBHAN and
CORAL GABLES IMPORTED MOTORCARS, INC.

vs.

FIAT MOTORS OF NORTH AMERICA

PETITION FOR WRIT OF CERTIORARI

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CASE NO.

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CHARLES M. REBHAN and
CORAL GABLES IMPORTED MOTORCARS, INC.
Petitioners

vs.

FIAT MOTORS OF NORTH AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT

CHARLES M. REBHAN and
CORAL GABLES IMPORTED MOTORCARS, INC.
petition for a writ of certiorari
to review the order of the
Former Fifth Circuit in this case

QUESTION PRESENTED

WHERE A JURY, PROPERLY INSTRUCTED BY THE DISTRICT COURT, RETURNS A GENERAL VERDICT IN FAVOR OF PLAINTIFFS ON CLAIMS OF FRAUD, BREACH OF AN ORAL CONTRACT, NEGLIGENCE, AND PROMISSORY ESTOPPEL, MAY THE FEDERAL APPELLATE COURT, CONSISTENT WITH THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, REWEIGH THE EVIDENCE AND SET ASIDE THE JURY VERDICT WHERE THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT THE JURY'S VERDICT?

LIST OF PARTIES

The Petitioners and plaintiffs below are Charles M. Rebhan (hereinafter "Rebhan") and Coral Gables Imported Motorcars, Inc., a Florida corporation (hereinafter "Gables"). The respondent, defendant below, if Fiat Motors of North America, Inc. (formerly known as Fiat Distributors, Inc.; hereinafter "Fiat"), a New Jersey corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	1
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	7
I. The Parties	7
II. The New Dealership Opens	14
III. Protest Letters Filed By Fiat's Existing Dade County Dealers	15
IV. Post-Licensing Hearing	18
REASONS FOR GRANTING THE WRIT	20

TABLE OF CONTENTS (Continued)

Page

A. THE STANDARD TO BE APPLIED IN APPEALS FROM JURY VERDICTS AND JUDGMENTS ENTERED THEREON .. 21

1. The Effect of Rule 50(b) And Rule 59 . 21

2. The Appropriate Standard of Appellate Review Under The Seventh Amendment 23

B. THE STANDARD OF REVIEW OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE STANDARDS ENUNCIATED BY THIS COURT 25

C. THE STANDARD OF REVIEW OF THE ELEVENTH CIRCUIT CONFLICTS WITH THAT OF OTHER CIRCUITS ... 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Adkins v. Ford Motor Co.,
446 F.2d 1105 (6th Cir. 1971) 26

Atlantic & Gulf Stevedores Inc. v. Ellerman Lines,
369 U.S. 355, 82 S.Ct. 780,
7 L.Ed. 2d 798 (1962) 19, 24

Beard v. Ellerman Lines, Ltd.,
289 F.2d 201 (3d Cir. 1960) 24

Boeing Co. v. Shipman,
411 F.2d 365 (5th Cir. 1969) 27

Bryant v. Liberty Mutual Insurance Company,
407 F.2d 576 (4th Cir. 1968) 27

Colonial Stores, Inc. v. Scarborough,
355 So.2d 1181 (Fla. 1977) 26

Commercial Credit Corp. v. Pepper,
187 F.2d 71 (5th Cir. 1951) 22

Dawson v. Chrysler Corp.,
630 F.2d 950 (3d Cir. 1980) 26

Denneny v. Siegel,
407 F.2d 433 (3d Cir. 1969) 27

Dimick v. Schiedt,
293 U.S. 474, 55 S.Ct. 296,
79 L.Ed. 603 (1935) 23

TABLE OF AUTHORITIES (Continued)

Page

Huddell v. Levin,
537 F.2d 726 (3d Cir. 1976) 27

Lewin v. Metropolitan Life Insurance Company,
394 F.2d 608 (3d Cir. 1968) 22

McDaniel v. Slade,
404 F.2d 607 (5th Cir. 1968) 27

O'Neill v. W. R. Grace & Company,
410 F.2d 908 (5th Cir. 1969) 22

Parsons v. Bedford,
28 U.S. 447, 3 Pet. 447, 7 L.Ed. 732 (1832) .. 24, 26

Powell v. Liberty Mutual Insurance Company,
419 F.2d 62 (5th Cir. 1969) 22

Pullman-Standard v. Swint,
___ U.S. ___ 102, S.Ct. 1781,
___ L.Ed.2d ___ (1982) 19

Spurlin v. General Motors Corp.,
528 F.2d 612 (5th Cir. 1976) 27

Tights, Inc. v. Acme-McCrary Corp.,
541 F.2d 1047 (4th Cir. 1976) 27

Tsai v. Rosenthal,
297 F.2d 614 (8th Cir. 1961) 24

TABLE OF AUTHORITIES (Continued)

Page

U.S. v. Socony-Vacuum Oil Co.,
310 U.S. 150, 60 S.Ct. 811, 856,
84 L.Ed. 1129 (1940) 23, 24

Wade v. Lane,
189 F.Supp. 661 (D.D.C. 1960),
aff'd. 290 F.2d 387 22

Florida Statutes:

Section 320.642, Florida Statutes 8, 9, 10, 15

Section 320.61, Florida Statutes 7

Other Citations:

2B Barron & Holtzoff, Section 1075 22

28 U.S.C., Section 1253(1) 2

Florida Administrative Code Rule 15C-1.08 8

Federal Rules of Appellate
Procedure 50(b) 21, 22, 24, 26

Federal Rules of Appellate Procedure 59 ..... 21, 22

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Coral Gables Imported Motorcars, Inc. and Charles M. Rebhan petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 673 F.2d 1234 (11th Cir. 1982), is set forth in the Appendix at A.1 to A7. The opinion of the Eleventh Circuit on rehearing reported at 680 F.2d 105 (11th Cir. 1982), is set forth in the Appendix at A17-A18. Respondent, Fiat also filed a Petition for Rehearing which was denied without opinion by the Eleventh Circuit on August 23, 1982, and is as yet unreported. A true and correct copy of that Order is set forth in the Appendix at A19.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1982. A timely petition for rehearing by Gables and Rebhan was granted in part and denied in part by that court on July 9, 1982. A timely petition for rehearing was filed by Fiat and was denied by the Eleventh Circuit on August 23, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On March 3, 1976, Gables and Rebhan filed a four count Complaint against Fiat.[1] The Complaint alleges that Fiat was guilty of fraud and deceit in inducing Rebhan to incorporate Gables as Fiat's franchisee based upon Fiat's misrepresentations that Gables was a "replacement" Fiat dealer and not an "additional" or third Fiat dealer in Dade County, Florida; that Fiat breached the oral contract made with Gables to pay the losses sustained by the dealership due to protests being filed with the Division of Motor Vehicles by its two existing dealers, and that Rebhan was a third-party beneficiary to this oral contract; an action for promissory estoppel based upon the expenditures made by Rebhan and Gables in order to start up the new franchise as a result of the misrepresentations of Fiat personnel; and an action for negligence in that if the

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[1]The Complaint and Amended Complaint, Answer and Counterclaim, Answer and Affirmative Defenses to Counterclaim, Amendment to Answer and Second Amendment to Answer of Fiat, Gables and Rebhan's Response to Fiat's Affirmative Defenses, Fiat's Answer and Affirmative Defenses to Amended Complaint, and Gables and Rebhan's Response to Affirmative Defenses of Fiat are all set forth in the Appendix at B1-B38.

The case was initially filed by Petitioners in the Dade County Circuit Court, Dade County, Florida, and was subsequently removed by Fiat to the United States District Court for the Southern District of Florida based upon diversity of citizenship of the parties.

statements made to Rebhan were not made with fraudulent intent, they were at least made negligently.[2]

Fiat filed its Answer on March 26, 1976 to the original Complaint admitting the allegations of the Complaint as to the parties and denying all else. Fiat also raised the affirmative defenses of statute of frauds, accord and satisfaction, novation and waiver. On June 23, 1976, Fiat amended its Answer setting forth additional affirmative defenses of want of consideration and ratification; thereafter a Second Amendment to Answer was filed by Fiat on or about July 16, 1976, based upon the release in the second franchise agreement. Finally, on September 23, 1977, Fiat answered Petitioner's Amended Complaint (Count IV—Negligence) admitting in part and denying in part the allegations and setting forth additional affirmative defenses.

Fiat thereafter filed Motions for Summary Judgment on September 17, 1976, and a Notice of Renewal of Motion for Summary Judgment on February 28, 1977. These Motions were denied by Order dated May 18, 1977.[3]

Again on March 4, 1980, Fiat filed a Motion for Summary Judgment which was extensively briefed by Petitioners and Fiat, and was denied by the District Court Judge by Order dated April 11, 1980.

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[2]Count IV of Amended Complaint, Appendix B18-B20.

[3]The motions were extensively briefed by Petitioners and Fiat and orally argued before the District Court Judge. They are not incorporated in the Appendix, but will be supplied supplementally if the Court should desire same.

This cause was thereafter tried for two weeks before a jury from April 7, 1980, to April 18, 1980, and the jury returned a general verdict in favor of Petitioners, awarding Gables $325,000.00 compensatory damages and $166,828.00 punitive damages, and awarding Rebhan $100,000.00 compensatory damages and $1.00 punitive damages.

Fiat filed post-trial motions for new trial and for judgment N.O.V. which were briefed and orally argued by the parties. These Motions were denied by the District Court Judge by Order dated August 29, 1980.[4]

Fiat thereafter filed a timely Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. After briefs were filed by the parties and oral argument was heard by that Court, by opinion dated April 23, 1982, the Eleventh Circuit reversed the jury verdicts basing the entire opinion on the evidence at the trial below concerning Fiat's affirmative defenses of release and waiver. 673 F.2d 1234, 1237-1240 (11th Cir. 1982).

By timely petition for rehearing[5] Rebhan and Gables apprised the Eleventh Circuit, *inter alia*, that the release

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[4]A copy of this Order is set forth in the Appendix at C1-C3.

[5]A copy of the petition for rehearing is set forth in the Appendix at D1-D29. The Petition raised other salient points which were not fully addressed by the Eleventh Circuit, including the fact that the Eleventh Circuit incorrectly applied the release to the oral contract between Fiat and Gables, as well as to the fraud claim even though Gables was not suing Fiat under the franchise agreement and thus the release should not apply; alternatively, that the fraud practiced upon Gables (and for that matter, Rebhan) was

which it held barred Rebhan's individual claims could not, as he was not a party to the second franchise agreement, with which position the Eleventh Circuit agreed; however the court went on to hold that Rebhan had waived his claim for fraudulent representation. 680 F.2d 105 (11th Cir. 1982). The balance of the petition for rehearing was denied.

Fiat then filed a Petition for Rehearing on July 28, 1982, which was denied by an Order dated August 23, 1982. Appendix A19.

(Footnote 5 Continued)

continuing in nature and the second franchise agreement's execution by Gables was a part of the fraud such that the release should not apply. The Eleventh Circuit also failed to apply the correct law, ruling that the choice of law provision of the second franchise agreement (New York law) should be applied to causes of action which arose in Florida and which were at best only distantly related to the terms and conditions of the second franchise agreement.

STATEMENT OF THE FACTS[6]

I.

THE PARTIES

A. Since 1957, Fiat automobiles had been marketed in the United States in ever increasing numbers. (E.472). By 1975 Fiat anticipated selling in excess of 100,000 new automobiles, and to accomplish this objective a massive expansion of Fiats small dealer network was critical. (E.472).

In prior years both the State of Florida, and its largest county, Dade County, had lagged behind the national market in sales of new Fiat's. (E.471-473, 728-731). In Spring 1975, Fiat determined to overhaul and enlarge its dealer network no matter what the cost.[7]

For years Fiat had been trying to add a third dealer to its dealer network in Dade County, Florida, but had been continually thwarted in this respect by its two existing franchisees, Orange Motors of Miami and Orange Motors of Coral Gables.[8] Each time Fiat

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[6]The facts set forth herein are taken from the transcript of testimony at the trial of this cause before the District Court and relevant portions of same are set forth in the Appendix at E52-E1013.

[7]Memo of Bernard Silveria, Fiat's Assistant National Sales Manager. Fiat's Trial Exhibit No. 75.

[8]Florida Statutes, §§ 320.60-320.70 establish a comprehensive statutory scheme for the licensing of those who would engage in the sale of automobiles in the State of Florida. F.S. §320.61 requires

tried to appoint a third dealer in Dade County, Florida, Orange Motors would protest under Florida Statute §320.642 or would thereafter to protest and as a result

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(Footnote 8 Continued)

any manufacturer, factory branch, factory representative, distributor, or importer to be licensed by the Florida Department of Highway Safety and Motor Vehicles in order to do business in Florida. Florida Statute §320.642 requires the Department of Highway Safety and Motor Vehicles to deny a motor vehicle dealer license in any community or territory where the licensee's (i.e. Fiat's) presently licensed franchised motor vehicle dealers have complied with licensee's agreements and are providing adequate representation in the community or territory for the licensee. The burden of proof in showing inadequate representation is upon the licensee (i.e. Fiat) seeking to expand its dealer network.

Under Rule 15C-1.08 of Florida Administrative Code, when the Department of Highway Safety and Motor Vehicles received an application for a new dealer license, the Director of the Division of Motor Vehicles was required to send a notice to the existing dealers of that make in the community or territory advising them that under Florida Statute §320.642 such existing dealers had an opportunity under the law to be heard on the establishment of the new dealer unless the existing dealers had previously filed statements in writing that they would not protest the establishment of the new dealer. The written statement is commonly called a letter of "no protest." If the existing dealers file a protest then an administrative hearing must be held and the licensee (i.e. Fiat) consistent with Florida Statute §320.642, must prove that its existing dealers are not complying with their franchise agreements and are not providing adequate representation in the community or territory before the new dealer can be licensed. The words "community or territory" are not defined but are interpreted by the Department of Highway Safety and Motor Vehicles to be the boundaries of a given county. (E.409, 415; testimony of John Calvin, Director of Division of Motor Vehicles, Department of Highway Safety and Motor Vehicles.)

any proposed third dealer would simply drop its application for a Fiat dealer's license.[9]

By February, 1975, Fiat was able to obtain a relinquishment by Orange Motors of Miami of its Fiat franchise. (E.475). Fiat induced its Puerto Rican distributor to purchase the franchise from Orange Motors of Miami by making certain promises to the distributor that were never kept.[10]

Shortly after the Orange Motors of Miami Fiat franchise was purchased, Orange Motors of Coral Gables terminated its Fiat franchise, and on March 26, 1975, Fiat appointed Herbert Oldsmobile, Fiat as its second Fiat dealer in Dade County, Florida.[11]

At the same time Fiat was overhauling its two dealer network in Dade County, Florida, two of its representatives, Robert Philbrook, the Southeast Regional Manager, and Bernard Silveria, the Assistant National Sales Manager were meeting with John Calvin in Tallahassee, Florida.[12]

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[9]Obviously no proposed dealer would want to go through the time and expense of an administrative hearing, risking that Fiat might not be able to make the showing required under Florida Statute §320.642.

[10]Fiat's Puerto Rican distributor (Armando Aguilar) testified that he agreed to buy the Orange Motors of Miami Franchise only because Fiat promised him that he would be the exclusive Fiat dealer in Dade County. (E.505, 508, 523, 533, 535).

[11]Fiat's trial exhibit No. 31.

[12]See notes 7 and 8, *supra*.

Mr. Calvin stated that he discussed Florida's licensing laws and regulations with the two men, how his department licensed "new" dealers (i.e. "additional" dealers), how his department determined "replacement" dealers (i.e. the replacement of an existing dealer by another so that the total number of dealers in a community or territory does not change), and how his department administered protests where "new" ("additional") dealers can be delayed from being licensed because the existing franchised dealers of a particular make can object to the appointment of that additional dealer.[13] (E.402-403).

Silveria's memo of the meeting with Calvin establishes that Fiat knew precisely how Mr. Calvin's department administered Florida's licensing law.[14]

In addition, immediately prior to the contact between Fiat and Rebhan which resulted in the establishment of Gables, Fiat had been stymied by an existing dealer located in Orange County, Florida. (E.424-429). There

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[13]See note 8, *supra*.

[14]See note 7, *supra*.

The significance of this meeting was apparent to the jury and to the District Court judge. Notwithstanding Fiat's knowledge that Mr. Calvin's department construed "community or territory" to be county lines (see note 8, *supra*) Fiat nonetheless treated the terms as having a more restrictive meaning. As the facts would later show Fiat told Rebhan the Gables dealership would be a mere "replacement" dealership for the former Orange Motors of Coral Gables dealership and thus not subject to protest and the attendant delay under Florida Statute §320.642, when in fact Gables was a "new" or "additional" Fiat dealer—the third—in Dade County and thus subject to protests by Fiat's existing dealers, which Fiat knew all along.

an application to the Department of Motor Vehicles had been filed by a proposed new dealer in Seminole County, Florida (next to Orange County) and Fiat's existing Orange County dealer filed a protest on April 3, 1975. (E.429). As a result, the new Seminole County, Florida dealer withdrew its application for a Fiat dealer's license.

B. Rebhan was the ideal candidate for the third Fiat dealership in Dade County, owning one of the most successful Dodge automobile dealerships in the United States (Trail Dodge), and having a solid history of running the kind of volume operation which Fiat needed in order to increase its sales. (E.52). Further, Rebhan was interested in selling Fiat's on a volume basis (E.55).

Rebhan's first contact with Fiat was with its District Sales Manager, William Bartlett, and in early April, 1975, Bartlett met with Rebhan, and the Trail Dodge Sales Manager, Fred Couch, at Trail Dodge. (E.56). At this meeting Bartlett told Rebhan and Couch that Fiat wanted a "replacement" dealer for the former Orange Motors of Coral Gables franchise.[15] (E.56). Rebhan, because he was a Dodge dealer, knew of an excellent location for the new dealership near the Coral Gables area, that would be available soon since its former tenant, a Chrysler-Plymouth dealer was relocating. (E.56). Bartlett was shown the available location and was enthusiastic about it; he also reiterated the availability of the Fiat franchise,

[15]In fact Fiat wanted a new third dealer to locate in the Coral Gables, Florida area because by this time it had already replaced its two prior dealers with Herbert Oldsmobile, Fiat and with its Puerto Rican distributor. See p. 9, *supra*, and accompanying notes.

but he did not tell Rebhan and Couch that the Fiat dealership proposed to them would be Fiat's third in Dade County and that its establishment would be subject to protest by Fiat's then existing two dealers.[16]

Approximately mid-April, 1975, Bartlett returned to Trail Dodge with Philbrook of Fiat. On this occasion Philbrook saw the prospective dealership location and was enthusiastic about even suggesting that the words "Coral Gables" be a part of the name of the new dealership.[17] (E.60).

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[16]One explanation for this omission is that Fiat paid Bartlett a bonus for signing new Fiat dealerships. (B.704-705)

[17]The significance of this suggestion by Philbrook lies in the difficulty Fiat had with the Florida dealer licensing law in trying to get its third dealer in Dade County. Philbrook knew how the Division of Motor Vehicles administered the law (pp. 9-10, *supra*) and he knew that Rebhan's dealership would be Fiat's third in Dade County and thus subject to protest by Fiat's two existing dealers. However, a logical inference to be drawn from this statement is that the confusion which could be generated by the use of the words "Coral Gables" in the third dealership name, coupled with Fiat's statements to Rebhan that the new dealership was to be a "replacement" for Orange Motors of Coral Gables, could be exploited by Fiat with the Division of Motor Vehicles resulting in the Division's approval of Fiat's third dealer in Dade County without the expense and delay of a licensing hearing.

At this time Fiat already knew that at least one of its existing two dealers (the one owned by the Puerto Rican distributor) would protest a third dealer, as Fiat had previously tried to solicit a "no protest" letter from him. (E.418-19); *supra*, pp. 8-9 and note 10.

By this time Philbrook had also contacted Mr. Calvin at the Division of Motor Vehicles by telephone at Calvin's office in

Finally, in the early part of May, 1975, Rebhan signed the Fiat franchise agreement, still being told by Fiat that he was a "replacement" dealer for Orange Motors of Coral Gables and not Fiat's third dealer in Dade County.[18] (E.63, 65, 71, 279, 300, 460-461, 777).

Nearly the same time that Fiat was recruiting Rebhan to open Gables as Fiat's third dealer in Dade County, Fiat was in trouble with its Puerto Rican distributor over the purchase of the former Orange Motors of Miami franchise. Armando Aguilar, Fiat's Puerto Rican distributor, was not living up to the terms of his franchise with Fiat. (E.549, 551-553, 555-557, 560, 564, 566). Of greater consequence was the fact that Aguilar learned that Fiat did not intend to keep its promise to him that he was to be the exclusive Dade County Fiat dealer as Fiat had already appointed Herbert Oldsmobile, the second Fiat dealer in Dade County.

(Footnote 17 Continued)

Tallahassee, Florida. In this conversation Philbrook asked Calvin if Fiat was going to have any difficulty in licensing Gables as a "replacement" dealer (as opposed to a "new" or third dealer). Calvin told Philbrook that as long as Fiat was not increasing the number of dealers that it had established in Dade County, the Department of Motor Vehicles would not apply Florida Statute §320.642 and would not consider any protest by an existing dealer. Philbrook told Calvin that Fiat had replaced Orange Motors of Miami with a dealership owned by its Puerto Rican distributor, but Philbrook did not tell Calvin that Herbert Oldsmobile, Fiat had been appointed already and that Gables would in fact be Fiat's third dealer in Dade County, thereby increasing by one Fiat's dealer network in Dade County. (E.417-421).

[18]The May, 1975 franchise agreement was signed by Fiat and Gables only and not by Rebhan personally. See Appendix F1-F48.

(E.505, 508, 523, 533, 535). Aguilar was infuriated by Fiat's dealings with him and he would not allow a third dealer to be appointed in Dade County. This fact was never made known to Rebhan prior to the time he made the decision to become a Fiat dealer.[19]

II.

THE NEW DEALERSHIP OPENS

Based upon Fiat's statements to him that a Florida dealer's license was assured, Rebhan signed a lease with Chrysler Realty (the owner of the facility shown to Messrs. Philbrook and Bartlett) for what was to be the Gables dealership.[20] The new dealership was repainted, cleaned up; mechanics, sales staff and clerical workers were hired and trained and Fiat was paid $45,000.00 for Gables initial order of Fiat parts. (E.68, 72-74, 80-82). Fiat delivered to Gables invoices which Fiat said were for the Fiat automobiles being shipped to Gables to arrive before Gables grand opening during the first week of July, 1975. (E.84). Those automobiles were not to arrive at the Gables dealership until after November 1, 1975.

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[19]E.995-997.

[20]See pp. 11-12, *supra*, and accompanying notes. Under this lease with Chrysler Realty, Rebhan was personally bound.

III.

PROTEST LETTERS FILED BY FIAT'S EXISTING DADE COUNTY DEALERS

Sometime prior to July 7, 1975 the Division of Motor Vehicles for the State of Florida learned that Gables was Fiat's third dealer in Dade County and not a true "replacement" dealer. In accordance with Division procedures, letters were sent by the Division to Aguilar and Herbert Oldsmobile, Fiat apprising them of Gables appointment as Fiat's third dealer in Dade County and telling them of their right to protest under Florida Statute §320.642.[21]

Both Fiat's existing dealers did file protests against Gables' appointment as a third Fiat dealer in Dade County.[22] Due to the protests Gables could not be licensed by the Division of Motor Vehicles and thus could not sell new Fiat automobiles, nor do warranty work or sell Fiat parts.[23] (E.118).

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[21]See note 8, *supra*, and accompanying text.

[22]Plaintiff's Exhibits Nos. 26 and 27.

[23]More importantly, an administrative hearing now had to be held by the Division of Motor Vehicles before Gables could receive its license (see note 8, *supra*) and there was no guarantee that Fiat would successfully prevail at the hearing and show that its two existing dealers were not living up to their franchise agreements with Fiat and not providing adequate representation in the community or territory for Fiat.

On July 7, 1975, Rebhan learned that protests against the Gables dealership would be filed by Herbert Oldsmobile Fiat and Aguilar. (E.93). These protests would completely curtail Gables business so Rebhan called the President of Fiat, Dewey Manning, at Fiat's home office in Montvale, New Jersey. (E.95-102). After stating the recent facts to Manning Rebhan was told by Manning not to worry since Fiat would "take care of any losses" which Gables incurred due to the protests being filed until such time as Gables had Fiat autos to sell.[24]

By August, 1975, Gables working capital was nearly depleted as Rebhan kept Gables open awaiting the hearing before the Division of Motor Vehicles.[25]

Rebhan called Willard Nelson, Fiat's National Sales Manager in August, 1975, asking what Fiat could do immediately to keep Gables open while awaiting the licensing hearing. (E.113). Due to the agreement between Manning (President of Fiat) and Rebhan that Fiat was

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[24]Fiat needed Gables in order to have the hearing before the Division of Motor Vehicles in order to gain its third Dade County Fiat dealership. If Rebhan had closed Gables and not elected to go through the hearing process with Fiat, Fiat would not have had the necessary proposed new dealership and would have once again been prevented from expanding to three Fiat dealers in Dade County. See note 8, *supra*, and accompanying text.

[25]Gables dire financial position and the effort made to remain open during the pendency of the licensing hearing before the Division of Motor Vehicles were thoroughly briefed in the proceeding before the Eleventh Circuit. They will not be addressed in any detail here because the Eleventh Circuit never reached the damage aspect of the case in reversing the jury verdict for the Petitioners.

going to reimburse Gables for its losses Nelson told Rebhan that Fiat would immediately send to Gables $30,000.00.[26] (E. 114).

Not until September 11, 1975, was a licensing hearing held before the Division of Motor Vehicles upon Fiat's application for its third dealer license (Gables) in Dade County[27] and on October 24, 1975, the Division of Motor Vehicles entered an Order granting Fiat's application for its third dealership in Dade County over the protests of Herbert Oldsmobile, Fiat and Aguilar.

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[26]Fiat did not send the money down in a lump sum as had been promised but rather sent the money in payments over a four week period, the first payment in the amount of $16,800.00 on September 5, 1975. By letter dated September 16, 1975, Rebhan apprised Fiat that this was not the agreement which had been reached between himself and Manning. Fiat never responded to Rebhan's letter of September 16, 1975, except that on October 8, 1975, it sent $13,200.00 to Gables stating in the accompanying letter that this fulfilled its obligation to Gables. Rebhan once again wrote to Fiat that this was not in keeping with the agreement between Manning and Rebhan but Fiat never responded. Fiat contended at trial that all it ever agreed to pay was $30,000.00 towards Gables rent; the jury heard testimony from both sides over this hotly contested issue (Petitioners claim of Fiat's breach of the oral contract) nonetheless it is not disputed that in August, 1975, Fiat sent its Business Management Manager from its Jacksonville, Florida zone office to Gables to make a review of Gables financial records so that an estimate of Gables losses could be made. (E.119, 648-649).

Rebhan testified that but for the agreement made with Manning he would have closed the Gables dealership and would have been able to terminate the ten year lease he personally signed with Chrysler Realty, significantly reducing the losses of Gables and himself personally.

[27]The entire transcript of testimony at this hearing was admitted into evidence as Fiat's Exhibit No. 14.

IV.

POST-LICENSING HEARING EVENTS

A. By November 1, 1975, Gables began receiving new Fiat automobiles to sell, but by this time all its working capital was depleted and Fiat had only paid $30,000.00 towards Gables losses.[28] (E.128-139, 1012-1013). As a result of the delay in obtaining its dealers license Gables had existed solely upon the sales of used cars and new Lancia's (a Fiat product with a much higher price) (E.102, 104, 120, 783); now Gables had to begin to play financial catch-up by selling new Fiats at virtually any price in order to generate cash flow. (E.121-122, 178-185, 786-787). In spite of its problems Gables nonetheless made a serious effort to remain in business and sold new Fiats at 131% of Fiat's projection for November and December of 1975, typically two of the worst months for new car sales. (E.190).

B. In early December, 1975, Rebhan was contacted by Bartlett of Fiat and advised that Gables had to renew its Fiat franchise agreement as the original franchise agreement would expire on December 31, 1975. The second franchise, signed by Rebhan as President of Gables on December 18, 1975 contained a broad release as part of its terms.[29] (E.123). If Rebhan did not

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[28]See note 26, *supra*.

[29]It is this release and its effect upon which Eleventh Circuit based its decision reversing the jury's verdict in favor of Gables. Initially the Eleventh Circuit also held that the release to which Rebhan was not personally a party, barred his individual claims. As a result of the Petition for Rehearing filed by Gables and Rebhan, the Eleventh Circuit, at 680 F.2d 105, redetermined the

sign the second franchise agreement, Gables would be terminated as a Fiat dealer, and any hope of keeping the business open as an ongoing entity would end. (E.215).

By the early part of 1976, Gables was continuing to lose money as it struggled to remain in business. At its year end, December 31, 1975, Gables had lost $66,615.00 (E.209), and in March, 1976, Rebhan contacted Fiat requesting reimbursement for that amount. At this point he was told unequivocally that no reimbursement would be made.[30] (E.220).

(Footnote 29 Continued)

facts presented to the jury to find that Gables released all its claims but that Rebhan had waived his claim of fraudulent representation. The Second Franchise Agreement is set forth in the Appendix at G1-G48.

The jury heard extensive testimony concerning the execution of the second franchise agreement and the release it contained; so did the trial judge at the hearings on summary judgment.

[30]The Eleventh Circuit, in its original opinion, 673 F.2d 1234, 1239 N.6, found Rebhan's testimony on this point "both contradictory and self-serving". This is another way of saying that the testimony is not credible. Yet it is not the function of an Appellate Court to determine the credibility of testimony heard by the jury, nor to determine the weight to be given to that testimony. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369, U.S. 355, 358-359, 82 S.Ct. 780, 783, 7 L.Ed. 2d 798 (1962). This Court has also had to recently pass on this same question in a non-jury action, and reversed the Fifth Circuit which had substituted its determination of the facts for that of the District Court Judge. *Pullman-Standard v. Swint*, __ U.S. __, 102, S.Ct. 1781, __ L.Ed. 2d __ (1982).

Without the promised help from Fiat, Rebhan was unable to keep Gables afloat and in July, 1976, the dealership closed its doors. Nonetheless, Fiat still had a third dealership available for franchise in Dade County where before it had only two dealerships.

REASONS FOR GRANTING THE WRIT

The Seventh Amendment to the Constitution of the United States provides that no fact tried by a jury is to be otherwise reexamined in any Court of the United States, than according to the rules of common law. Notwithstanding this clear constitutional mandate the Eleventh Circuit Court of Appeals reexamined and reweighed the conflicting evidence heard by the jury during two weeks of trial and arrived at a contrary result. This action on the part of the Eleventh Circuit squarely conflicts with prior decisions of this Court and of other courts of appeal.

I

THE BROAD APPELLATE REVIEW AND REEXAMINATION OF THE FACTS TRIED BEFORE THE DISTRICT COURT JURY BY THE ELEVENTH CIRCUIT CONTRAVENES THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, PRIOR DECISIONS OF THIS COURT AND PRIOR DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL

A.

THE STANDARD TO BE APPLIED IN APPEALS FROM JURY VERDICTS AND JUDGMENTS ENTERED THEREON

1.

THE EFFECT OF RULE 50(b) AND RULE 59

The proceedings before the District Court Judge are subject to correction at that level under the provisions of F.R.C.P. 50(b) and 59. In the proceedings below Fiat filed a timely motion for Judgments Notwithstanding Verdicts and Alternatively for New Trial.[31] Turning first to the Motion for Judgments Notwithstanding Verdicts, its settled that such motion raises only the legal question

[31]Neither the Motions nor the Memoranda of Law filed for and against the Motions are set forth in the Appendix in an attempt to keep the Appendix at a reasonable size. If the Court desires same they will be supplied supplementally.

whether there was enough evidence to make an issue for the jury. *Powell v. Liberty Mutual Insurance Company*, 419 F.2d 62 (5th Cir. 1969); *O'Neill v. W. R. Grace & Company*, 410 F.2d 908 (5th Cir. 1969). The credibility of the witnesses and weight of the evidence are not the concern of the court on a Motion for Judgment Notwithstanding Verdict. The evidence must be viewed in the light most favorable to the party moved against, and he must be given the benefit of all legitimate inferences which may be drawn in his favor from that evidence; the motion must be denied if reasonable men might differ as to the conclusions of fact to be drawn. 2B Barron & Holtzoff (Wright ed.) §1075.

The standard to be applied by the District Court Judge in ruling upon a Motion for new trial under Rule 59 is one which is necessarily flexible in its application. Generally the trial court will not interfere with a jury verdict unless it is clear that the jury has reached a seriously erroneous result, and a verdict should not be set aside merely because the court—as trier of fact—might have reached a different result on conflicting evidence. *Lewin v. Metropolitan Life Insurance Company*, 394 F.2d 608 (3rd Cir. 1968); *Commercial Credit Corp. v. Pepper*, 187 F.2d 71, 75-76 (5th Cir. 1951); *Wade v. Lane*, 189 F.Supp. 661 (D.D.C. 1960), aff'd. 290 F.2d 387.

Clearly then, based upon the policy articulated in F.R.C.P. 50(b) and 59 and the cases construing same the determination of whether there was enough evidence to submit the case to the jury or whether the verdict is

against the weight of the evidence[32] is for the trial judge in the first instance.

2.

THE APPROPRIATE STANDARD OF APPELLATE REVIEW UNDER THE SEVENTH AMENDMENT

The appropriate standard for appellate review under the Seventh Amendment to the United States Constitution must have its foundation in the common law as it existed at the time of the adoption of the amendment in 1791. *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935). At common law the means of review of facts found by a jury were the granting of a new trial by the court where the issue was tried, or to which the record was returnable or the award of a *venire facias de novo* by an appellate court for some error of law which occurred in the proceedings.

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[32]This Court has held that the action of a trial judge in denying a motion for new trial on the ground the verdict was against the weight of evidence is not subject to review. *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248, 60 S.C1. 811, 856, 84 L.Ed. 1129 (1940)

A review of the opinion of the Eleventh Circuit, 673 F.2d 1234 (11th Cir. 1982), makes it clear that what the court has done is to make an independent finding that the facts presented to the jury were not sufficient to support the verdicts. That the court had to reweigh and reevaluate those facts is apparent by its choice of language. "It cannot be seriously disputed . . .", 673 F.2d at 1238, 1239; "Appellees must have been aware . . .", 673 F.2d at 1239; "Rebhan's testimony . . . is both contradictory and self-serving.", 673 F.2d at 1239, N.6; and as to Fiat's defense of waiver,". . . appellees knew or should have known . . . all pertinent facts . . . ," 673 F.2d at 1240.

Parsons v. Bedford, 28 U.S. 447, 3 Pet. 447, 7 L.Ed. 732 (1832).

Stated another way, the only standard to be applied by an appellate court under which the facts may be examined is where a motion for directed verdict upon an issue is made at trial and a subsequent motion for judgment N.O.V. is made under F.R.C.P. 50(b). *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir. 1961). In this instance and in this instance only is an appellate court's review raised to a *question of law* such that the Seventh Amendment is not violated. This is the only basis upon which the Eleventh Circuit could have made the exhaustive reevaluation which it did of the disputed testimony in this case.[33]

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[33] *U.S. v. Socony-Vacuum Oil, supra.* The language of at least one case decided by this court suggests that even if the question before the appellate court has become one of law under a proper Rule 50(b) Motion the appellate court is still not at liberty to substitute its view of the facts for that of the jury. In *Beard v. Ellerman Lines, Ltd.*, 289 F.2d 201 (3rd Cir. 1960) the Court reversed a judgment entered upon jury findings in favor of the Stevedore against the shipowner and held that under the evidence the stevedore owed indemnity to the shipowner, 289 F.2d at 207-209. The opinion of the Third Circuit indicates that the shipowner who appealed met the procedural requirements of F.R.C.P. 50(b). 289 F.2d at 202 ("It [the District Court] later denied Ellerman's alternative motions to set aside the verdict in Beard's favor or for a new trial.") In its review of the case this Court reversed the Third Circuit, stating, "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law'." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 358-359, 82 S.Ct. 780, 783, 7 L.Ed. 2d 798 (1962).

B.

THE STANDARD OF REVIEW OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE STANDARDS ENUNCIATED BY THIS COURT

As shown above[34] the Eleventh Circuit reweighed and reevaluated the evidence tried to the jury in this case and, deciding it did not like the result reversed the jury verdicts remanding for "further proceedings not inconsistent with this opinion".[35] 673 F.2d at 1240.

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[34]See note 32, *supra*, and accompanying text; note 33, *supra*.

[35]The only proceedings which could take place before the District Court judge based upon the Eleventh Circuit's opinion would be dismissal of all of Gable's claims and dismissal of Rebhan's claim for fraud, 680 F.2d 105, and though the opinion on rehearing is silent as to this point, a new trial on Rebhan's other claims. The problem is that the opinion of the Eleventh Circuit initially (673 F.2d 1234) or upon rehearing (673 F.2d 105) provides little insight into what the further proceedings are to be. The Complaint and Amended Complaint (which added a negligence count at Count IV, see Appendix B) sought relief for both Gables and Rebhan for fraud (Count I), for Gables and Rebhan for breach of the oral contract (to which Rebhan was a third-party beneficiary by virtue of his ownership of Gables and his being personally obligated on the lease for Gables premises)—Count II, for Gables and Rebhan based upon promissory estoppel (Count III), and for negligent representation of the status of Gables as a "replacement" dealer as opposed to a "new" or third Fiat dealer in Dade County (Count IV).

All four issues were submitted to the jury for decision and a general verdict in favor of Petitioners was returned. Fiat did not claim error before the Eleventh Circuit as to the use of a general verdict (see Appendix H1-H4 being a portion of Fiat's Brief to the Eleventh Circuit) thus any claim of error here has been waived. It

Several of the cases of this Court with which the Eleventh Circuit's opinion conflicts have been cited above,[36] and do not need further discussion.

C.

THE STANDARD OF REVIEW OF THE ELEVENTH CIRCUIT CONFLICTS WITH THAT OF OTHER CIRCUITS

Other Courts of Appeal which have faced appeals where the appropriate motion has been made under F.R.C.P. 50(b) have not taken the position of the Eleventh Circuit and violated the clear mandate of the Seventh Amendment or the decisional law of this Court.

In *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980) the issue arose in the context of whether the trial judge erred in denying a motion for directed verdict or for judgment notwithstanding verdict. 630 F.2d at 959. The Third Circuit acknowledged that its role in the appellate process was a limited one, circumscribed by the prohibition contained in the Seventh Amendment. *Id.* The Third Circuit stated:

(Footnote 35 Continued)

thus appears that Rebhan's personal award should stand but the Eleventh Circuit nonetheless reversed this jury's award. See, for example, *Adkins v. Ford Motor Co.*, 446 F.2d 1105 (6th Cir. 1971) (applying Tennessee law). *Colonial Stores, Inc. v. Scarborough*, 355 So.2d 1181 (Fla. 1977).

[36] See note 33 and accompanying text, *supra*, and *Parsons v. Bedford*, *supra*.

"Thus, we are admonished to review the record in this case in the light most favorable to the non-moving party, the Dawsons, and to affirm the judgment of the District Court denying the motions unless the record 'is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief.' *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969); accord, *Huddell*, 537 F.2d at 737."

See also *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976).

In a patent infringement action, the Fourth Circuit held that in determining whether a verdict should have been directed in the case, and assessing the sufficiency of the evidence, the Court was bound by the Seventh Amendment, and the Court could not "weigh the evidence; pass on the credibility of witnesses, or substitute our judgment of the facts for that of the jury." *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1055 (4th Cir. 1976). See also *Bryant v. Liberty Mutual Insurance Company*, 407 F.2d 576, 578 (4th Cir. 1968).

Similarly, the Fifth Circuit has held that it cannot ignore the jury's verdict except where there is a "complete absence" of probative facts to support the verdict. *McDaniel v. Slade*, 404 F.2d 607, 608 (5th Cir. 1968) and cases cited therein. Accord, *Spurlin v. General Motors Corp.*, 528 F.2d 612, 614 (5th Cir. 1976); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) en banc).[37]

[37]In denying Fiat's Motions for Judgment Notwithstanding Verdicts Or In The Alternative for New Trial, the District Court judge relied upon the *Boeing* decision. See Appendix C1-C3.

CONCLUSION

For the reasons set forth above, Petitioners, Charles M. Rebhan and Coral Gables Imported Motorcars, Inc. pray that a writ of certiorari be issued to review the judgment of the Eleventh Circuit Court of Appeals.

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Respectfully submitted,

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